UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NILAB RAHYAR TOLTON *et al*., *on behalf of themselves and all others similarly situated*, *Plaintiffs*, v. JONES DAY, a General Partnership, *Defendant*.	Civil Action No. 19-945 (RDM)

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

In their Third Amended Complaint (Dkt. 41, "TAC"), Plaintiffs Nilab Rahyar Tolton, Andrea Mazingo, Meredith Williams, Saira Draper, Jaclyn Stahl, and Katrina Henderson ("Plaintiffs" or "Class Representatives") supplement their already well-pleaded claims with allegations regarding, *inter alia*, Jones Day ("Defendant" or "the Firm") Managing Partner Stephen Brogan's singular influence over Firm culture and policies (*see, e.g.*, TAC ¶¶ 4–14, 19–20, 22, 30, 31, 41, 44, 54, 57), the extensive and material changes made by Jones Day to the Firm's website after this litigation commenced (*see e.g.*, TAC ¶¶ 8–10, 42, 46), and the policies and practices through which Jones Day engages in a pattern and practice of discrimination against women, whether intentionally or otherwise (*see, e.g.*, TAC ¶¶ 14–16, 33, 35–36, 43–44, 48, 54–55, 57, 59, 89–96, 101–04, 115–6, 120, 135–6, 138, 154, 156–57, 165–66, 174–75, 181, 187, 196–97, 209, 239–41, 249–51, 265–67, 289–90, 297–98, 293–95, 309), and retaliates immediately and pointedly against those who dare to question those policies and practices (*see, e.g.*, TAC ¶¶ 110, 126–30, 170, 220–21, 227–28, 243, 246, 248–49, 304–05). The TAC also supplements Plaintiff Henderson's allegations (*see, e.g.*, ¶¶ 33, 41, 272, 274–76, 280–83, 287, 290, 293–95, 297, 299, 304–05) and adds a race discrimination claim on her behalf under § 1981 (Count 23, ¶¶ 579–84).

Jones Day's supplemental memorandum (Dkt. 58, "Def.'s Suppl. Mem.") doubles down on the central strategy of its original motion (Dkt. 37, "Def.'s Mot. J. Pleadings," hereinafter "Def.'s Mot."), invoking summary judgment and class certification decisions in an effort to obscure the actual pleading standard. *See generally* Dkt. 43, Pls.' Opp. Def.'s Mot. J. Pleadings (hereinafter "Pls.' Opp"). Defendant supplements this misleading tactic with similarly improper appeals to its own facts and opportunistic mischaracterizations of Plaintiffs' allegations. This Court should deny Defendant's petition for a premature end to Plaintiffs' well-pleaded case.

ARGUMENT

I. Katrina Henderson's NYCHRL Claims are Timely

Contrary to Jones Day's contentions, Plaintiff Henderson has timely alleged gender discrimination and wrongful termination claims pursuant to the New York City Human Rights Law ("NYCHRL"). N.Y.C. Admin. Code § 8-101, *et seq.* Ms. Henderson asserts that, in violation of the NYCHRL, Jones Day subjected her and similarly situated female associates to a pattern of unlawful conduct, including pay discrimination, denial of developmental opportunities, billable hours, and career advancement, unwarranted and disparate criticism, and a hostile work environment; this discriminatory pattern continued until she departed from the Firm in July 2016. *See* TAC ¶¶ 270, 278, 496–98, 500–02. Additionally, Plaintiff Henderson alleges Jones Day subjected her to various discriminatory acts during her final weeks at the Firm: prematurely forcing her off of the payroll; requiring her to locate a new position after scheduling a set end date, in contrast to other, male associates; Partner Slack's threat that Jones Day would "drag [her] through the mud" and "ruin [her] reputation"; and, finally, her wrongful termination. *Id.* ¶¶ 304–07, 574.

A. Wrongful Termination & July 2016 Departure

Ms. Henderson's claims relating to her departure in July 2016 are clearly timely under the "liberal construction" the NYCHRL requires. *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 66 (N.Y. App. Div. 2009); *accord Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 109–10 (2d Cir. 2013). A three-year statute of limitations governs claims brought pursuant to the NYCHRL. N.Y.C. Admin. Code § 8-502(d). Ms. Henderson's last day of employment was in mid-July 2016, TAC ¶ 304, and she joined this case on June 24, 2019. *See* Dkt. 26. Key events here occurred in the weeks leading up to Plaintiff Henderson's departure in mid-July 2016, *see* TAC ¶¶ 304–306; her claims of discrimination based on these events are therefore timely.

Jones Day's contention that these actions do not constitute "new acts of discrimination" (Def.'s Suppl. Mem. at 4) is in error. The NYCHRL prohibits employers, such as Jones Day, from "discriminat[ing] . . . in compensation or in terms, conditions or privileges of employment." N.Y.C. Admin. Code § 8-107(1)(a)(3). And, unlike federal and state law, the NYCHRL only requires a plaintiff to plausibly allege that she was treated "less well" than an individual outside her protected class to survive a motion to dismiss. *See Williams*, 61 A.D.3d at 78; *Gordon v. City of New York*, No. 14-CV-6115, 2018 WL 4681615, at *15 (S.D.N.Y., Sept. 28, 2018) (explaining that plaintiffs face "a lesser burden of showing only that Defendants' actions were based, in part, on discrimination") (internal quotation marks omitted). Henderson has met this burden. First, while Henderson alleges that she was "affiliated" with the Firm until mid-July 2016, she was prematurely removed from the payroll at the end of June 2016, thereby directly impacting her compensation, a recognized adverse action. N.Y.C. Admin. Code § 8-107(1)(a)(3). Moreover, given the persistent, gender-based discrimination that Henderson identifies throughout the TAC—actions which, at the very least, may serve as supporting background evidence—Henderson has plausibly alleged that, after being discriminatorily terminated, she was "treated less well than other employees because of her gender" when she was denied compensation. *Williams*, 61 A.D.3d at 78; *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (noting that plaintiffs are permitted to use "prior acts as background evidence in support" of a discrimination claim); TAC ¶¶ 278–80, 284–89, 298–99 (disparate treatment in pay and other terms and conditions).

Second, Partner Slack's threats to Henderson were made "[a]round the time Ms. Henderson was preparing to depart Jones Day" (and was therefore still employed); these threats were sufficiently hostile and gender-based to establish a claim for relief under the NYCHRL. TAC ¶ 305. Indeed, by informing Henderson that she would be within her rights to sue but that Jones Day

would "drag [her] through the mud" and "ruin [her] reputation," Partner Slack recognized (1) that Henderson had valid discrimination claims and (2) Jones Day would retaliate aggressively if she were to complain of that discrimination. *Id.* This threat, delivered at a time when Henderson was still employed, is certainly more severe than the "petty slights and trivial inconveniences" rejected by the *Williams* court. *Williams*, 61 A.D.3d at 80 (quotation marks omitted); *id.* at 76 (concluding that under the NYCHRL, questions of the severity and frequency of hostile work environment claims should generally be reserved for damage calculations); TAC ¶ 498 (alleging that Henderson and the New York subclass were subject to a hostile work environment). When placed in the context of the other adverse actions Henderson identifies throughout her complaint, TAC ¶¶ 278–80, 284–89, 298–99, Partner Slack's comments easily fall within an actionable hostile work environment claim under the NYCHRL. *Williams*, 61 A.D.3d at 80 (explaining that a plaintiff's hostile work environment claims should only be dismissed if they are "truly insubstantial").

Finally, Henderson's clarifying allegation in the TAC that she was not aware of any comparable male associates who were similarly required to schedule their end date plausibly alleges that she was treated "less well" based on her gender. *Id.* at 78; *cf. Mihalik*, 715 F.3d at 110 n.8 (explaining that under the NYCHRL, a defendant is only entitled to *summary judgment* if it can show that "discrimination played *no* role in its actions") (internal quotation marks omitted and alterations incorporated); *Gordon*, 2018 WL 4681615, at *15.

As for the timeliness of Ms. Henderson's wrongful termination claim, while Jones Day first communicated to Ms. Henderson its intention to terminate her employment in December 2015, it is not clear "from the face of" the pleadings that this claim is untimely. *See Morris v. Carter Glob. Lee, Inc.*, 997 F. Supp. 2d 27, 33 (D.D.C. 2013). Specifically, based on the NYCHRL's broad, remedial scope, Ms. Henderson's termination should be deemed to have

accrued on her last day of employment (mid-July 2016), rather than on the day she was informed of her termination (December 2015).

Both state and federal courts have consistently recognized that "*all* provisions of the [NYCHRL] require[] independent construction to accomplish the law's uniquely broad purposes," *Williams*, 61 A.D.3d at 67–68; *Mihalik*, 715 F.3d at 109, and that the law's provisions must be construed "independently from and more liberally than" state and federal laws. *Gordon*, 2018 WL 4681615, at *15 (quoting *Ben-Levy v. Bloomberg, L.P.*, 518 F. App'x 17, 19–20 (2d Cir. 2013)); *Williams*, 61 A.D.3d at 66–68. Accordingly, Ms. Henderson's claims under the NYCHRL cannot be judged by the more constrained interpretations of New York *state* law, under which "an employment discrimination claim accrues on the date that an adverse employment determination is made and communicated to the plaintiff." *Cordone v. Wilens & Baker, P.C.*, 286 A.D.2d 597, 598 (N.Y. App. Div. 2001); *Vig v. N.Y. Hairspray Co.*, 93 A.D.3d 565, 565–66 (N.Y. App. Div. 2012). Indeed, state courts have expressly extended the "liberal" and "uniquely broad and remedial" aim of the NYCHRL to their interpretation of the continuing violations doctrine, discussed in more detail below. *Williams*, 61 A.D.3d at 66, 72–73; *Jeudy v. City of New York*, 142 A.D.3d 821, 823 (N.Y. App. Div. 2016). This extension clearly indicates a willingness, pursuant to the NYCHRL, to reanalyze and reexamine statutes and doctrines—such as when an employee's wrongful termination accrues—that bear on the timeliness of a plaintiff's claim. (*See also* Pls.' Opp. at 38 n. 42.) Consequently, given the express, legislative instruction that all exceptions under the NYCHRL should "be construed narrowly in order to maximize deterrence of discriminatory conduct," N.Y.C. Admin. Code § 8-130(b), as well as the state courts' broad interpretation of the doctrine, the more remedial last-day formulation should govern Henderson's wrongful termination claim. Under this formulation, Ms. Henderson's claim accrued in mid-July 2016, well within the

three-year statute of limitations.

B. Continuing Violations Doctrine

In addition to asserting plausible allegations relating to her departure from the Firm in July 2016, Henderson's additional gender-based discrimination allegations are timely pursuant to the NYCHRL's continuing violations doctrine. Under this doctrine, employment actions that are otherwise time-barred are considered timely filed if they are part of either a "continuing policy" or a "consistent pattern of discriminatory . . . practices." *Williams*, 61 A.D.3d at 72. Notably, the NYCHRL expands on the more limited federal doctrine, permitting plaintiffs to point to discrete employment decisions, such as "hiring, assignment, transfer, promotion[,] and discharge," under a continuing violations theory, so long as such actions were part of "a continuing policy" or practice, *id.* (quotation marks omitted), and are sufficiently connected to actionable conduct during the limitations period. *Id.* at 80–81.

As described above, Henderson alleges various particular employment actions that were all part of the Firm's "fraternity" culture, as well as the Firm's "black box" system, encompassing the Firm's pay secrecy policy, its Managing Partner policy, its subjective evaluation policy, and its "no whining" policy. TAC ¶¶ 1, 20, 270–307, 310. Moreover, all of the allegations relating to Henderson's departure are demonstrably part of a "consistent pattern" of similar discriminatory conduct as alleged throughout the TAC by Plaintiff Henderson: her supervisor's persistent, gender-based criticism and hostility; her unequal pay; the Firm's criticism that she was not working hard enough alongside its refusal to provide her with billable work; and denial of billable work necessary for advancement. *See, e.g.*, TAC ¶¶ 272, 278, 284–91, 297–98. These allegations are sufficiently similar in type to Henderson's other, timely allegations of gender discrimination to warrant application of the continuing violations doctrine under its more generous NYCHRL

interpretation. *Cf. Williams*, 61 A.D.3d at 81 (concluding that plaintiff's timely complaints were not part of a discriminatory pattern or policy because they were not related to "differences in treatment with male workers," as her other, time-barred allegations were). Given the "uniquely remedial provisions" of the NYCHRL, as well as the broad application of the continuing violations doctrine under that law,[1] Henderson's additional allegations of gender discrimination, including if necessary wrongful termination, should be considered as timely filed. *Id.* at 72–73.

C. Equitable Estoppel

While Ms. Henderson maintains that her gender discrimination and wrongful termination claims are timely and/or proper under the continuing violations doctrine of the NYCHRL, she also seeks discovery as to whether equitable estoppel applies to these claims. Plaintiffs have already fully explained why Ms. Henderson's request for equitable estoppel should proceed to discovery. Pls.' Opp. at 39–41. Plaintiffs briefly respond, however, to the additional arguments raised in Jones Day's supplemental motion. First, Jones Day contends that Partner Slack "merely told [Ms. Henderson] that Jones Day would vigorously defend itself *in any litigation*," and, therefore, Slack's comments did not constitute a cognizable threat for equitable estoppel purposes. Def.'s Suppl. Mem. at 4. Jones Day's argument is misplaced. Slack's comment that Jones Day would "fight back" does not necessarily equate to the Firm simply "vigorously defend[ing]" itself in court. Rather, there are various ways that Jones Day could conceivably "fight back" outside that context, from interfering with her efforts to obtain subsequent employment to taking other steps to

[1] *See Jeudy*, 142 A.D.3d at 823 (permitting plaintiff to bring time-barred claims under the NYCHRL because such claims were part of a consistent pattern of defendant's refusal to promote plaintiff); *Ferraro v. N.Y.C. Dep't of Educ.*, 115 A.D.3d 497, 497–98 (N.Y. App. Div. 2014) (concluding whether NYCHRL claims were timely under the continuing violations doctrine was a fact issue not properly resolved on the pleadings and permitting plaintiff to amend complaint).

otherwise "ruin" Henderson's reputation in the legal community. Indeed, Partner Slack's additional threats—that Jones Day would "ruin [her] reputation" and "drag [her] through the mud"—are more readily interpreted as threats to Henderson's career or general well-being than as legitimate tactics of litigation. Jones Day is not entitled at the pleading stage to the inferences and factual interpretations that most favor it. *Brown v. Sessoms*, 774 F.3d 1016, 1020 (D.C. Cir. 2014).

Similarly, contrary to Jones Day's contentions, the fact that (1) Partner Slack may not have had supervisory authority over Ms. Henderson and (2) the conversation between Plaintiff Henderson and Partner Slack occurred over "coffee outside the building" does not defeat Henderson's claim for equitable estoppel. Def.'s Suppl. Mem. at 5 (citing N.Y. P'ship Law § 20(2))[2]. Along with ignoring the remedial purpose of the NYCHRL,[3] Jones Day's arguments here unreasonably require this Court to determine the facts at issue, namely the exact circumstances surrounding the conversation between Ms. Henderson and Partner Slack, as well as Partner Slack's supervisory authority over Ms. Henderson; this Court has previously declined to engage in such calculations at this stage of litigation. *Holmes v. Univ. of the D.C.*, 244 F. Supp. 3d 52, 60 (D.D.C. 2017) ("[F]or the [defendant]'s affirmative defense to prevail at this stage of the proceeding, the allegations in the complaint must suffice to establish it." (internal quotation marks omitted and alterations incorporated)). Defendant demands here that the Court draw inferences in *Jones Day's* favor; this, of course, is just the opposite of what is proper at this stage. *Brown*, 774 F.3d at 1020.

[2] N.Y. P'ship Law § 20(2) explains that "[a]n act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners." However, as Slack's comments indicate, "fight[ing]" an employee's claims are plausibly a component of Jones Day's "usual" business.

[3] *See Williams*, 61 A.D.3d at 74 (noting that the City Council passed the Restoration Act to reflect its desire for the NYCHRL "to be construed *more broadly than federal civil rights laws and the State HRL*, and [for] the local law's provisions to be construed as *more remedial than federal civil rights laws and the State HRL*").

Jones Day's arguments are also unconvincing. Simply because the conversation occurred outside the office does not somehow undermine the otherwise clear context of her interaction with Partner Slack: while Ms. Henderson was preparing to depart from the Firm, a Partner met with her to discuss her future legal career, and specifically the Firm's express intention to destroy that career if she pursued the discrimination claims Partner Slack acknowledged she would have. That these words were uttered near the Firm's offices rather than in them does not alter the reality that Ms. Henderson, like any reasonable listener in her position, would have understood Partner Slack to be communicating a threat *from* Jones Day.[4]

Similarly, even if Partner Slack exercised no supervisory authority over Ms. Henderson, this fact (if true) is not determinative. The crux of Ms. Henderson's claim for estoppel is not whether Partner Slack and Jones Day could have destroyed Ms. Henderson's career *at Jones Day* but, rather, whether Plaintiff Henderson credibly feared that they would act against her after her departure. It is Partner Slack's status as a Partner at Jones Day, rather than any direct supervisory authority she may have had over Ms. Henderson at Jones Day, that supports Ms. Henderson's claim. Slack's Partner status not only gave her insight into the Firm's intentions and capacities, but also more credibility when she conveyed those intentions and capacities to Ms. Henderson. Accordingly, Plaintiff Henderson's equitable estoppel claim should move forward to discovery.

II. Plaintiff Henderson Has Stated a Viable Claim Under 42 U.S.C. § 1981

A. Henderson Plausibly States a Claim Under § 1981 Based on Conduct Occurring from August 2015 to July 2016

"[T]o state a claim for racial discrimination under Section 1981, a plaintiff must allege that

[4] *Cf. Koppman v. S. Cent. Bell Tel. Co.*, CIV.A 90–4503, 1992 WL 142390, at *13 (E.D. La. June 17, 1992) (concluding that one agent of an employer's threats could estop another agent of the same employer because the threats served to protect both employers from the plaintiff's separate retaliation claims).

(1) the plaintiff is a member of a racial minority;[5] (2) the defendant intended to discriminate against the plaintiff on the basis of race; and (3) the discrimination concerned an activity enumerated in § 1981." *Wilson v. DNC Servs. Corp.*, 315 F. Supp.3d 392, 399–400 (D.D.C. 2018) (quotation marks omitted and footnote inserted); 42 U.S.C. § 1981(a)–(b). Notably, while "the pleading standards under section 1981 track those in the familiar *McDonnell Douglas* rubric for alleging a *prima facie* case," plaintiffs are *not* required to allege more than the basic elements of the *prima facie* case or to specifically identify comparators in order to survive a motion to dismiss or judgment on the pleadings. *Nanko Shipping, USA v. Alcoa, Inc.*, 850 F.3d 461, 467 (D.C. Cir. 2017) ("Allegations regarding comparators, racial comments, and pretext obviously strengthen a discrimination complaint, but th[os]e evidentiary requirements . . . are inapplicable at the pleading stage.").

As an initial matter, Jones Day concedes that certain of Ms. Henderson's allegations of discriminatory conduct are within the applicable four-year statute of limitations.[6] Def.'s Suppl. Mem. at 2. Specifically, despite receiving a positive review in May 2015, Ms. Henderson continued to struggle to find work throughout her time at Jones Day. TAC ¶¶ 296–97. Although the Firm agreed that certain work such as pro bono projects would satisfy her hours requirement, "the Firm further suppressed her billable hours by preventing her from entering her billable time." TAC ¶ 297. Finally, in December 2015, Ms. Henderson was informed that she would be terminated, leading to her departure in mid-July 2016, as well as the attendant discriminatory conduct described above. *Id.* ¶¶ 301, 303–06.

Jones Day contends that Henderson has failed to plausibly allege that any of these timely

[5] Jones Day does not contest that Plaintiff Henderson is a member of a racial minority.
[6] Ms. Henderson first asserted claims of racial discrimination on August 16, 2019. Consequently, any conduct occurring on or after August 16, 2015, is necessarily timely. *See Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 383 (2004); 28 U.S.C. § 1658(a).

allegations were based on her race. Def.'s Suppl. Mem. at 2. Not so. As described above, Henderson alleges that Jones Day subjected her to multiple adverse actions after August 2015. *See* TAC ¶¶ 296–306.[7] Reading the complaint as a whole, as is required at this stage of litigation, *Matthews v. District of Columbia*, 730 F. Supp. 2d 33, 37 (D.D.C. 2010), Henderson has also identified significant circumstantial evidence prior to August 2015, including unlawful pay discrimination, [8] which helps create a reasonable inference of racial discrimination under § 1981.

[7] To the extent Jones Day asserts that Henderson has only alleged that these particular adverse actions were based on her gender, Jones Day's argument is unavailing. *See* Def.'s Suppl. Mem. at 2–3. Ms. Henderson may point to her termination and the discriminatory actions surrounding her departure from the Firm in 2016 as actionable discrimination based on both her race and gender. *See Davis v. Ashcroft*, 355 F. Supp. 2d 330, 339–40 (D.D.C. 2005) (considering the plaintiff's claim that she was not promoted due to her race and gender). Jones Day cites nothing to support its bald assertion that simply because these adverse actions may *also* be due to gender discrimination, Plaintiff Henderson cannot plausibly assert a § 1981 claim. Indeed, even assuming that a plaintiff must ultimately choose between competing theories as to defendant's unlawful motivations, she plainly should not be forced to do so at the pleading stage. *See* Fed. R. Civ. P. 8(d)(3) ("A party may state as many separate claims . . . as it has, regardless of consistency."). Given the circumstantial evidence of both race and gender discrimination discussed throughout the operative Complaint, Ms. Henderson is well within her rights to allege claims under both the NYCHRL and 42 U.S.C. § 1981.

[8] Jones Day contends that, because Ms. Henderson does not allege that her quality or quantity of work was "nearly identical" to her comparators, she has failed to plausibly allege that she was treated differently than "similarly situated" employees under § 1981. Def.'s Suppl. Mem. at 3–4. Notably, while Plaintiffs address Ms. Henderson's comparators with respect to her EPA claims separately in Section V, Jones Day's argument also fails under § 1981. Putting aside the fact that Henderson and Stancil may not have had comparable quantities of work due to Jones Day's alleged racial discrimination, *see* TAC ¶ 285, Ms. Henderson is not required to plead more than the basic elements of a *prima facie* case to survive at the pleadings stage. *Nanko Shipping, USA*, 850 F.3d at 467. Henderson alleges that she "performed similar work as these male comparators, attended the same trainings, and understands she likely billed more hours than Zachary Werner and David Katz." TAC ¶ 287. Similarly, "like Ms. Henderson, Mr. Goldstein completed a mix of corporate work and real estate assignments in his first year with the Firm." *Id.* Finally, in her first year—when Henderson was undeniably similarly situated to her fellow first year associates—Henderson did not receive a raise while two white male associates did. *Id.* ¶ 288–89. This meets the "not onerous" burden to state a claim for relief under § 1981. *Nanko Shipping, USA*, 850 F.3d at 467; *see also Wilson*, 315 F. Supp. 3d at 400 (concluding that plaintiff, an African American presidential candidate with limited national reach or support, was similarly situated to Bernie Sanders because both "registered with the F[EC] and contacted the DNC"); *see also Morris*, 997 F. Supp. 2d at 37–38 (noting that plaintiff had plausibly alleged a claim under § 1981 when he alleged "that he [wa]s

Morgan, 536 U.S. at 113; *see, e.g.*, TAC ¶¶ 278–89, 294–95.[9] This clear pattern of disparate treatment implicating race creates a reasonable inference that from August 2015 through July 2016, Jones Day was merely continuing a pattern of discrimination against Ms. Henderson based on her race. *See Brown*, 774 F.3d at 1022 ("A plaintiff can raise an inference of discrimination by showing that she was treated differently from similarly situated employees . . . ." (internal quotation marks omitted)); *Wilson*, 315 F. Supp. 3d at 400 (denying motion to dismiss because plaintiff, an African American presidential candidate, was denied the opportunity to enter into a contract for DNC voter data while Bernie Sanders, "a white candidate who was similarly situated in that he also registered with the F[EC] and contacted the DNC" was offered a contract).

Indeed, the particular adverse actions to which Jones Day subjected Ms. Henderson in late 2015 were themselves continuations of the discriminatory conduct to which Jones Day had subjected Ms. Henderson throughout her time at the Firm. *See Fitzgerald v. Henderson*, 251 F.3d 345, 364–65 (2d Cir. 2001) (denying summary judgment and explaining that although certain

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a member of a racial minority who was discriminated against on the basis of his race with respect to" his termination).

[9] Jones Day opportunistically recasts these allegations to remove any plausible inference of racial discrimination. For instance, according to Jones Day, Henderson's claims she was denied the same mentorship opportunities as Bret Stancil "provide [no] basis to infer that this disparity arose from racial animus." Def.'s Suppl. Mem. at 3 (citing TAC ¶ 285). This unreasonably negative reading of Henderson's allegation is just the opposite of the controlling standard for a motion for judgment on the pleadings; moreover, Jones Day fails to recognize that "[a] plaintiff can raise an inference of discrimination by showing that she was treated differently from similarly situated employees . . . ." *Brown*, 774 F.3d at 1022 (internal quotation marks omitted). Henderson and Stancil were in the same class year and worked on the same projects together; despite this similar background, Stancil received mentorship opportunities that Henderson was repeatedly denied. TAC ¶ 284–86. Moreover, while Henderson's associate mentor left the firm shortly after Henderson arrived, it is the fact that the Firm "never assigned Henderson a replacement" that forms the basis of this disparate treatment claim. *Id.* ¶ 286; Def.'s Suppl. Mem. at 3–4. Finally, while Henderson does allege that Roy Hood, a white senior associate, refused to give her work, she also contends that Stancil was given significantly more work than she was, despite being in the same class year. TAC ¶¶ 283, 285. At this stage, these claims suffice to support an inference that Jones Day's conduct in late 2015 was, consistent with its past conduct toward Ms. Henderson, race-based.

allegations of sexual harassment were not timely, those allegations clearly illustrated the defendant's motivation for his later, timely conduct); *Chien v. Sullivan*, 313 F. Supp. 3d 1, 11–12 (D.D.C. 2018) (noting that various instances of hostile work environment could be considered as "non-actionable background evidence" in the event they were not "adequately linked" to the timely conduct (internal quotation marks omitted)). Even where Ms. Henderson does not explicitly state that this conduct was based on her race, her allegations considered together meet the "not onerous" bar to state a claim for relief under § 1981. *Nanko Shipping, USA*, 850 F.3d at 467.

Jones Day raises two specific arguments in opposition, neither of them supported by the facts or the law. First, Jones Day points to the fact that Ms. Henderson does not explicitly allege that she was denied billable hours in August 2015 because of her race and, instead, points to her gender as the primary basis. Def.'s Suppl. Mem. at 2. Similarly, because Ms. Henderson does not explicitly mention her race as the reason for her termination, and "alleges that Jones Day was especially eager to *hire* minority attorneys," Jones Day contends that Ms. Henderson's § 1981 claim fails. *Id.* (citing TAC ¶¶ 295–97, 300–01). However, as explained above, Ms. Henderson may allege that an adverse action is based on both her race and gender, particularly at this early stage of litigation. *Supra* n.6. Moreover, Ms. Henderson *did* allege that she had been consistently denied billable hours while white, male comparators had either been provided work or, alternatively, had kept that work for themselves. TAC ¶¶ 283, 285. Finally, even if "Jones Day was especially eager to hire minority attorneys"—an inference that is certainly not required given the allegations at issue—this does not defeat Ms. Henderson's claim. First, Jones Day's argument ignores the clear inference from Ms. Henderson's allegations: despite consistently subjecting Ms. Henderson to disparate treatment and limited career opportunities due to her race, Jones Day nonetheless relied on her as a minority representative, furthering illustrating that Ms. Henderson's

race, rather than her professional contributions to the Firm, dictated the Firm's treatment of her. TAC ¶ 295. Second, a plaintiff may still "demonstrate that she received unfavorable treatment" based on a particular employment action, even if someone within her protected class was treated better. *Stella v. Mineta*, 284 F.3d 135, 145–46 (D.C. Cir. 2002) (concluding that plaintiffs can still assert failure to promote claims even if someone within their protected class was ultimately chosen, since they may still have been "treated differently from similarly situated" employees outside their protected class); *Dickerson v. District of Columbia*, 315 F. Supp. 3d 446, 454 n.4 (D.D.C. 2018).

B. Ms. Henderson Has Plausibly Alleged a Continuing Violation Under § 1981

Along with the post-August 2015 allegations detailed above, Henderson's additional claims of disparate treatment based on her race should be considered timely filed as part of a continuing violation under § 1981. Under the continuing violations doctrine, a plaintiff's allegations are timely if they are part of a "pattern-or-practice" such that the discriminatory conduct is the defendant's "standard operating procedure." *Pintro v. Wheeler*, 35 F. Supp. 3d 47, 54 (D.D.C. 2014) (internal quotation marks omitted); *see also Milani v. Int'l Bus. Machs. Corp. Inc*, 322 F. Supp. 2d 434, 452–53 (S.D.N.Y. 2004) (noting that the Court's ruling in *Morgan* does not apply to "pattern-or-practice" claims in such situations); *cf. Thorne v. Cavazos*, 744 F. Supp. 348, 350 (D.D.C. 1990) (concluding that plaintiff's complaint had provided plaintiff with sufficient notice of his pattern or practice claim based on the cumulative allegations in his administrative complaints, even though plaintiff "fail[ed] to expressly allege a pattern and practice"). This Court has previously recognized the applicability of the continuing violation doctrine to § 1981 claims. *Uzoukwu v. Metro. Wash. COG*, 130 F. Supp. 3d 403, 413 (D.D.C. 2015).

Ms. Henderson has sufficiently identified a pattern of discriminatory actions under § 1981 that continued until she departed from Jones Day in mid-July 2016. These actions included (1)

being paid less than similarly situated white male associates, consistent with Jones Day's "black box" system; (2) being given fewer billable hours than white male associates; and (3) being denied mentorship or career advancement opportunities, in contrast to similarly situated white male associates. TAC ¶¶ 283–89, 295. Moreover, Plaintiff Henderson has plausibly alleged that this pattern is part of a larger culture at Jones Day that is discriminatory toward people of color. *See, e.g., id.* ¶¶ 282, 294–95. Finally, as alleged in the TAC, all of the conduct relating to Henderson's termination and departure from the Firm was part of this continuous pattern of intentional discrimination. *Cf. Nat'l Fair Hous. All., Inc. v. Prudential Ins. Co. of Am.*, 219 F. Supp. 2d 104, 105 (D.D.C. 2002) (concluding that, after *Morgan*, plaintiffs had sufficiently alleged a continuing violation when they asserted that defendant "engaged in a continuing course of intentional discrimination" and at least one allegation was timely). The Court should therefore conclude that all of Henderson's § 1981 allegations are timely under the continuing violations doctrine.

III. Plaintiff Meredith Williams Has Stated a Plausible Claim of Gender Discrimination

Although Plaintiffs have already fully explained why Ms. Williams has sufficiently stated a claim of gender discrimination, Pls.' Opp. at 33–35, Plaintiffs briefly respond to the additional arguments raised in Jones Day's supplemental memorandum. *See* Def.'s Suppl. Mem. at 5. Jones Day primarily attacks Williams's allegation that, in contrast to her 2017 review, two male associates who engaged in similar conduct did not receive lower reviews. *Id.* (citing TAC ¶ 175). According to Jones Day, because Ms. Williams has not alleged that she and these male associates engaged in "similar offenses" or were "disciplined by the same supervisor," Ms. Williams cannot point to her negative 2017 review as evidence of gender discrimination. *Id.* Putting aside the fact that Jones Day, once again, ignores the numerous other adverse actions that Ms. Williams

identifies in the TAC alongside her 2017 performance review,[10] Jones Day's argument fails.

In order to state a claim of gender discrimination, Ms. Williams's burden is simple: she must point to particular facts illustrating that "(1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination." *Wiley v. Glassman*, 511 F.3d 151, 155 (D.C. Cir. 2007) (quotation marks omitted). Critically, however, "[a]t the motion to dismiss stage, the district court cannot throw out a complaint even if the plaintiff did not plead the elements of a prima facie case." *Holmes*, 244 F. Supp. 3d at 61 (quotation marks omitted).

Plaintiff Williams has easily cleared this "modest hurdle" by pointing to two male associates who, despite engaging in similar conduct, were not criticized in their annual reviews. TAC ¶ 175; *Hedgeye Risk Mgmt., LLC v. Heldman*, 271 F. Supp. 3d 181, 189 (D.D.C. 2017); *see also Childs-Pierce v. Util. Workers Union of Am.*, 383 F. Supp. 2d 60, 70 (D.D.C. 2005) (explaining that, on summary judgment, a plaintiff may show pretext by pointing to evidence that she received more significant discipline than someone outside her protected class). Jones Day's argument that Ms. Williams must allege that she and her comparators were disciplined by the same supervisor misconstrues Williams's burden at this stage of litigation. First, the case that Jones Day relies upon, *Burley v. Nat'l Passenger Rail Corp.*, 801 F.3d 290 (D.C. Cir. 2015), was decided on a motion for summary judgment and, therefore, does not determine the sufficiency of Williams's claims at this stage of litigation. Second, even on a motion for summary judgment, a plaintiff is not *required* to show that she and her comparator were disciplined by the same supervisor; rather,

[10] Throughout the TAC, Ms. Williams points to various adverse actions to support her gender discrimination claims, including: being paid less than similarly situated male attorneys; being subjected to sexist and discriminatory comments from male associates and partners; and being denied non-discriminatory information about career advancement. *See* TAC ¶¶ 164–65, 168–72.

this is merely a *factor* for the court to consider in determining whether the plaintiff has established pretext. *Id.* at 301; *see also Childs-Pierce*, 383 F. Supp. 2d at 70 n.5 (noting in summary judgment context that "[i]n a case alleging disparate treatment in discipline, the focus of the analysis should be on the nature of the offenses committed . . . ."); *cf. Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998) (concluding that courts "should make an independent determination as to the relevancy of a particular aspect of the plaintiff's employment status and that of the non-protected employee"). Moreover, nothing in the TAC suggests that Ms. Williams and these two male associates were *not* reviewed by the same supervisor; indeed, Ms. Williams alleges that she worked on both projects. TAC ¶ 175. And, as Plaintiffs have consistently alleged, an associate's annual performance evaluation at Jones Day is generated through a centralized process, not by individual supervisors. *See* TAC ¶¶ 14–15, 19.

Finally, read in the light most favorable to Williams—as is required at this stage—Williams's conduct and the conduct of her two comparators is sufficiently similar that Jones Day's disparate treatment of them creates a reasonable inference of gender discrimination. Both incidents involved an ostensible failure by an associate to take responsibility for their work and, more specifically, the associate's choice to rely on other individuals to complete that work for them. And, although Jones Day contends that, unlike Williams's comparators, Williams's conduct led to a particular negative result, that is not apparent from the face of the TAC. Def.'s Suppl. Mem. at 5–6. Rather, Ms. Williams explained that the associate to whom she delegated the work "dropped the ball" and "failed to complete an assignment"; similarly, Williams's two comparators "failed to leave adequate time to prepare a summary judgment briefing" and "delegated important case management responsibilities" to Ms. Williams and a paralegal. Both instances plausibly suggest a negative result through either a rushed or incomplete assignment. TAC ¶ 167, 174–75. To the

extent that differences in their conduct may explain Jones Day's disparate treatment of them, that is an argument for summary judgment, not a motion for judgment on the pleadings. *Hedgeye Risk Mgmt., LLC*, 271 F. Supp. 3d at 189.

Along with applying a summary judgment standard to Williams's allegations of disparate treatment, Jones Day also improperly rejects Williams's allegation that, "upon information and belief," men generally received more favorable reviews than women and were not held to the same standards. Def.'s Suppl. Mem. at 6 n.1 (citing TAC ¶¶ 174–75, 181). Jones Day contends that because "[a]ssociates are free to discuss their evaluations," Ms. Williams cannot rely upon "information and belief" to support her allegations of gender discrimination. Def.'s Suppl. Mem. at 6 n.1. Jones Day mischaracterizes Ms. Williams's allegations. Ms. Williams does not simply contend that men received more favorable reviews generally; rather, she asserts that women received lower reviews even "when the *individual reviews and ratings* they received did not justify low overall ratings." TAC ¶ 174 (emphasis added). These underlying individual reviews and ratings were *never* shared with associates. *See id.* ¶ 14. Instead, partners merely read a "consensus statement" that purported to aggregate them. *Id.* Contrary to Jones Day's contentions, therefore, the very reviews and ratings that underly Ms. Williams's allegations are "peculiarly within the possession and control of the defendant"; Ms. Williams may rely on her "information and belief" to support this claim. *Hedgeye Risk Mgmt., LLC*, 271 F. Supp. 3d at 189 (quotation marks omitted).

As for Ms. Williams's allegation that men are not subjected to the same standards, TAC ¶ 181, plaintiffs may rely upon "information and belief" when "the belief is based on factual information that makes the inference of culpability plausible." *Hedgeye Risk Mgmt., LLC*, 271 F. Supp. 3d at 189. Ms. Williams has met this burden. First, she has identified two comparators who, despite engaging in similar conduct to hers, did not receive poor reviews; indeed, one of them was

later promoted to partner. TAC ¶ 175. Second, Ms. Williams points to the inconsistency between (1) Plaintiff Jaclyn Stahl being criticized for turning down work and Williams being told she was overburdened; and (2) Williams's comparator being promoted to partner despite being so "overburdened" that he had to delegate important work to Williams. *Id.* ¶ 175, 179–80.

A. Ms. Williams Has Plausibly Alleged Hostile Work Environment & Constructive Discharge Claims

Plaintiff Williams has sufficiently alleged that she was subjected to a hostile work environment and was constructively discharged. Jones Day's conclusory arguments relating to one component of Williams's allegations—the "game" of "Fuck, Marry, Kill"—do not alter this fact. As an initial matter, Jones Day grossly downplays the severity of the incident Ms. Williams describes in the TAC. *See* Def.'s Suppl. Mem. at 6. This incident was not "fleeting." *Id.* Instead, it was at least the second time it had occurred; during both incidents, partners were, at the very least, present. *See* TAC ¶¶ 94, 168. Similarly, Cary Sullivan was not merely "present when female associates were encouraged to" participate. Def.'s Suppl. Mem. at 6. As Ms. Williams clearly states in the TAC, "male Jones Day attorneys, including Partner Cary Sullivan, *targeted female associates* to play along." TAC ¶ 168 (emphasis added). And finally, contrary to Jones Day's contention, the severity of sexual harassment does not depend on whether a plaintiff "refused to engage" in the harassing conduct; rather, it is the very fact that the game occurred at all—in an enclosed limousine, no less—that gives rise to Williams's claim. *Id.* Jones Day attempts to sidestep this fact by conveniently ignoring Williams's subsequent allegation that she and fellow female associates remained in the limousine "in shocked discomfort" for the remainder of the drive. *Id.* [11]

[11] Jones Day also argues that Ms. Williams does not allege that the incident involving the "Fuck, Marry, Kill" "game" had "any impact whatsoever on her career at Jones Day." Def.'s Suppl. Mem. at 6. When the TAC is read as a whole, however, it is clear that this incident—which was the first of many indicating that the "male brotherhood" at Jones Day would not support Williams's

Along with mischaracterizing Ms. Williams's clearly articulated allegation, Jones Day continues to incorrectly assert that Ms. Williams's hostile work environment claim is predicated on this "single, isolated incident." Def.'s Suppl. Mem. at 6. However, in addition to the egregious conduct described above, Ms. Williams points to the consistent and severe disparate treatment that she suffered at Jones Day as a basis for her hostile work environment claim. *See* Pls.' Opp. Def.'s Mot. J. Pleadings at 35–36; *Baird v. Gotbaum*, 662 F.3d 1246, 1252 (D.C. Cir. 2011) (concluding that plaintiffs may point to a series of discrete employment actions as evidence of both disparate treatment and a hostile work environment). Notably, while "a motion to dismiss is not the appropriate vehicle for evaluating the character or consequences of acts alleged to create a hostile work environment," *Terveer v. Billington*, 34 F. Supp. 3d 100, 121 (D.D.C. 2014) (quotations omitted), Ms. Williams has nonetheless plausibly alleged the following pattern of disparate and discriminatory treatment: she was paid less than similarly situated male associates for similar work; she was given a discriminatory review and told that this negative review would bar her from being considered for partnership; she was constantly subjected to the "sexist, sexualized banter" of the "male brotherhood" of Jones Day and observed male attorneys refer to female attorneys as "stuck up," "too intense," or "no fun" if they did not join in that culture; she was denied mentorship and, indeed, was reported to Darren Cottriel when she questioned a female attorney about career advancement opportunities for women; and she was told she should never have children in order to succeed at Jones Day. TAC ¶¶ 164–65, 168–71, 173–76, 181.

These allegations, taken as true and read in the light most favorable to Williams, are more than sufficient to survive at this stage. *See Motley-Ivey v. District of Columbia*, 923 F. Supp. 2d

advancement at the Firm unless she acquiesced to its sexist and sexualized culture—certainly had an impact on her "career at Jones Day."

222, 233–34 (D.D.C. 2013) (denying defendant's *summary judgment* motion when plaintiff illustrated that defendant had a practice of imposing "unjustified" discipline on her that was "continuous" and harsher than the discipline imposed on her male colleagues); *Wise v. Ferriero*, 842 F. Supp. 2d 120, 126 (D.D.C. 2012) (concluding that plaintiff had stated a claim for relief when he "identified myriad incidents" of disparate treatment throughout his employment); *Sims v. Sunovion Pharm., Inc.*, No. 17-2519 (CKK), 2019 WL 690343, at *11 (D.D.C. Feb. 19, 2019) ("Because Plaintiff has alleged some conduct in support of her claim, such as disparaging treatment by management and reductions to her work responsibilities, the facts in Plaintiff's [complaint] support her hostile work environment claim." (internal quotation marks omitted)).

In addition to these allegations, Ms. Williams's experiences consistently confirmed that she would never be able to advance at Jones Day due to her gender, further supporting her constructive discharge claim. For example, while Ms. Williams was told that she was "overcommitted," her colleague, Plaintiff Jaclyn Stahl, was criticized for turning down work; these inconsistent criticisms illustrated a clear lose-lose situation for Ms. Williams going forward. *Id.* ¶ 178–79. Similarly, as explained above, Ms. Williams's own experiences demonstrated that male associates were held to lower performance standards than women, further limiting her chances to advance at Jones Day. *Id.* ¶ 181. These concerns were later confirmed during a conversation with Partner-in-Charge Grabowski, in which Grabowski explained that even one negative review—such as the discriminatory one Ms. Williams had just received in 2017—would destroy her chances of becoming partner and that "her pro bono and other contributions to the Firm were simply 'icing on a bad cake.'" *Id.* ¶ 180. Moreover, when Ms. Williams reached out to female attorneys who had left Jones Day, one former associate stated that although she had spent years being underpaid at Jones Day in an attempt to become partner, she eventually realized that her goal of advancing at

Jones Day was increasingly unlikely. *Id.* ¶ 182. As an example of the difficulties even women who made partner continued to face at Jones Day, the female associate also pointed to an apparently successful female partner who "was not paid commensurately" for her significant efforts. *Id.* Indeed, after Ms. Williams was forced to resign, Partner Finkelstein further emphasized Ms. Williams's diminished prospects when, during her exit interview, he stated that women "choose to have families" as an explanation for the Firm's poor retention of female attorneys. *Id.* ¶ 172.

Taken together, Ms. Williams's allegations plausibly allege that, faced with similar circumstances, a reasonable person would have resigned. *See Williams v. Johnson*, 776 F.3d 865, 872–73 (D.C. Cir. 2015) (interpreting D.C. law and affirming a jury's finding that plaintiff had established a claim of constructive discharge when the plaintiff was subject to harassment and, although she "was nominally put in a new position, her new supervisor had not found any work for [the plaintiff] to do in more than five months of asking"); *Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 362–63 (D.C. 1993) (explaining that discriminatory actions that "essentially locked [the employee] into a position" and did not allow for career advancement could support a finding of constructive discharge); *Hunt v. Cont'l Cas. Ins.*, No. 13–cv–05966–HSG, 2015 WL 5461573, at *4–5 (N.D. Cal. Sept. 16, 2015) (concluding, on a motion for summary judgment, that plaintiff had established a claim of constructive discharge when her supervisors made comments about her and other employees' ages and bragged about the employee turnover in the department, few women were hired, and plaintiff experienced a sudden downturn in her performance reviews).[12] Ms. Williams should be permitted to move forward with discovery on all of her claims.

IV. Plaintiffs Have Enhanced the Plausibility of Disparate Impact on Women, Pregnant

[12] Notably, while Ms. Williams has plausibly alleged that she was constructively discharged, "[w]hether working conditions are so intolerable that a reasonable person is forced to resign . . . is a question for the trier of fact." *Williams*, 776 F.3d at 872 (quoting *Arthur Young & Co.*, 631 A.2d at 362); *Hunt*, 2015 WL 5461573, at *3.

Women, and Mothers[13]

A. At Jones Day, "No Whining" Means Women Must Suffer Discrimination in Silence

Jones Day's "No Whining" policy bears little resemblance to the anodyne exemplars Defendant cites. Supp. Mem. 7. The Firm warns women not to even broach the fairness of their pay, TAC ¶¶ 41; 48; 54; 136; 166; 240; 290, and it rejects any attempts to appeal their evaluations, TAC ¶ 14. Earnest questions about policies for women trigger retaliatory ire. TAC ¶¶ 53–4; 100–04; 170. And if a woman dares to put forward concerns about equal opportunity, the Firm ostracizes her. TAC ¶¶ 55–56; 126–28; 220–21. Even now, in its public filings, the Firm openly defies the notion that it would redress known, gender-based grievances. Def.'s Reply 17 (Dkt. 47) (upon receiving complaints of a publicly revealed, gender-based disparity, "the Firm ***might*** rectify the disparity" but this would be among "highly speculative and attenuated" inferences (emphasis added)); Supp. Mem. 12 (indicating such redress would be "speculative"). In this context, and given Managing Partner Stephen J. Brogan's totalitarian grip on Jones Day, his "No Whining" mantra indicates his role in spearheading a policy of contempt towards grievances—including legitimate, gender-based ones. TAC ¶¶ 4; 19–20; 54; 57; 314.

Like its policy of enforced pay secrecy, Jones Day's "No Whining" policy exacerbates inequities by punishing those who would bring them to light. The causation is plain enough: by blocking discriminatory practices from being publicly identified and redressed, these Firm policies

[13] For ease of reference, Plaintiffs will continue to refer to "women" as encompassing women who are pregnant and mothers. In so doing, Plaintiffs do not relinquish any claims; to the contrary, the impact of gender discrimination on this sub-class may reasonably be inferred to only intensify in the contexts of the specific employment practices that Plaintiffs have identified. *See* Opp. 18; National Women's Law Center, The Wage Gap: The Who, How, Why, and What to Do (2019), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/10/The-Wage-Gap-Who-How-Why-and-What-to-Do-2019.pdf (describing discrimination experienced by caregivers). Plaintiff Tolton's and Plaintiff Draper's factual allegations strongly support this inference. TAC ¶¶ 105–06, 109–10, 122, 127, 196, 202, 224.

lock them into place. Pls.' Opp. 16–21. Jones Day's attempt to obfuscate this by manufacturing an overwrought causal chain is unavailing, particularly at this pleading stage.[14] It is well-recognized that gender discrimination plagues the legal profession, in pay, promotions, and advancement opportunities.[15] Accordingly, women—especially at a male-dominated workplace with an alleged fraternity culture—can be fairly expected to suffer disproportionately when the Firm suppresses not just grievances, but even quotidian conversations about attorney compensation. *Accord Brown v. Nucor*, 785 F.3d 895, 916–17 (4th Cir. 2015); *see also, Crawford v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, 555 U.S. 271, 279 (2009) ("This is no imaginary horrible given the documented indications that '[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.'" (quoting Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20 (2005) and citing *id.* at 37, and n. 58 (compiling studies)); Harvard Business Review, *Research: Gender Pay Gaps Shrink When Companies Are Required to Disclose Them* (Jan. 2019), https://hbr.org/2019/01/research-gender-pay-gaps-shrink-when-companies-are-required-to-disclose-them.

[14] *Carrero-Ojeda v. Autoridad de Energía Eléctrica*, 755 F.3d 711, 718 (1st Cir. 2014) ("[A] complaint need not plead facts sufficient to establish a prima facie case, or allege every fact necessary to win at trial, to make out a plausible claim. The prima facie standard is an evidentiary standard, not a pleading standard, and there is no need to set forth a detailed evidentiary proffer in a complaint.") (internal quotation marks and citations omitted); *accord Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 788–89 (3d Cir. 2016).

[15] *See e.g.*, Karen Zraick, *Lawyers Say They Face Persistent Racial and Gender Bias at Work*, NYTimes (Sept. 6, 2018), https://www.nytimes.com/2018/09/06/us/lawyers-bias-racial-gender.html; Aebra Coe, *White Men Have Leg Up In Legal Industry, Attys Say*, Law360 (Sept. 6, 2018), https://www.law360.com/articles/1079270/white-men-have-leg-up-in-legal-industry-attys-say?copied=1 ("White, male attorneys are given a leg up when compared to women and attorneys of color, whose careers are negatively affected by the 'widespread' bias in the legal industry . . . ."); Destiny Peery, Report of the 2018 NAWL Survey on Retention and Promotion of Women in Law Firms, *available at* https://www.nawl.org/page/2017 (at Am200 firms, the median woman associate makes only 96% of what the median man makes ($7,712/year less), and the mean woman associate makes only 95% of what the mean man makes (~$8,959/year less)).

To evade this commonsense inference, Jones Day asserts that its policies, while they may lock in disparities, supposedly cannot cause them. Supp. Mem. 12. Such casuistry blinks reality, and courts recognize as much. Pls.' Opp. 8, n.10 (collecting cases);[16] *cf. Reynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 490 (7th Cir. 2012) (finding that an "incremental causal effect," "which [was] the alleged disparate impact" had been wrongly "overlook[ed]").[17] Adopting Jones Day's self-serving metaphysics would threaten to radically undermine enforcement of the Nation's bedrock civil rights protections. *See, e.g.*, *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 619–20 (2d Cir. 2016) (affirming that Fair Housing Act plaintiffs made out a prima facie case of discrimination based on "perpetuation of segregation").

At the pleading stage, Plaintiffs are entitled to the reasonable inference that both pay secrecy and grievance suppression also "bak[e]" discrimination into pay decisions. Def.'s Reply 17; *cf. Sobel v. Yeshiva Univ.*, 839 F.2d 18, 23 (2d Cir. 1988); *Scott v. Family Dollar Stores, Inc.*,

[16] *Figueroa v. Pompeo*, *see* Def.'s Reply 17, does not hold otherwise. 923 F.3d 1078, 1082 (D.C. Cir. 2019). Rather, the court affirmed summary judgment (only ***after*** discovery) on disparate impact claims because the *pro se* plaintiff provided "**no analysis** of [his] statistics, instead relying on the bare . . . figures without any indication of the statistical significance of any demonstrated discrepancies reflected in them." *Figueroa v. Tillerson*, 289 F. Supp. 3d 212, 228 (D.D.C. 2018), *aff'd in part, vacated in part, rev'd in part sub nom. Pompeo*, 923 F.3d 1078. To show disparate impact causation at summary judgment, plaintiffs must "typically provide some statistical analysis of their data to discount the likelihood that the disparities shown are the consequence of random variation rather than unlawful animus." *Id.* at 230 (collecting cases). Here, plaintiffs demonstrate "more than a sheer possibility that a defendant has acted unlawfully," *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015), so a statistical analysis of causation awaits Jones Day's cooperation in the normal discovery process

[17] *See also Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, 358 F. Supp. 3d 66, 79 (D.D.C. 2019) (recognizing that lack of access to pay data injures members of women's and Latinx organizations in their ability to advocate for employees, including by negotiating with and educating employers about pay inequities, evaluating potential legal claims, and otherwise improving their working conditions). *See also* Kristin Wong, *Want to Close the Pay Gap? Pay Transparency Will Help*, NYTimes (Jan. 20, 2019), https://www.nytimes.com/2019/01/20/smarter-living/pay-wage-gap-salary-secrecy-transparency.html (discussing research that "keeping salaries secret reinforces discrimination").

733 F.3d 105, 110, 116 (4th Cir. 2013). For example, when salaries are raised based on prior salary on an annual basis, preventing discrimination from being remedied perpetuates existing pay inequities through future compensation decisions. *Cf. Calibuso v. Bank of Am. Corp.*, 893 F. Supp. 2d 374, 393 (E.D.N.Y. 2012). So too, Firm policies that prevent remediation of gender discrimination in performance evaluations and other aspects of employment may further embed pay disparities. *E.g. Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 532 (N.D. Cal. 2012) (recognizing "derivative additional disadvantage" to class through discriminatory employment practice). As to the tendency of pay secrecy policies to foster gender-based pay disparities, the considered judgment of many state legislatures affirms the reasonableness of this inference. *See e.g.*, D.C. Code Ann. § 32-1452 (generally prohibiting enforced pay secrecy); N.Y. Lab. Law § 194(4) (same); Cal. Lab. Code § 1197.5(k) (same).

B. Hyper-centralized, Subjective Decision-making Is a Specific Employment Practice That Disparately Harms Women

Subjective decision-making that is hyper-centralized, shrouded in secrecy, and unchecked in the hands of one man,[18] in conjunction with gender-based disparities plausibly alleged by

[18] Jones Day cries reverse discrimination because Plaintiffs suggest decision-making by male partners about women associates is more vulnerable to discriminatory bias. Def.'s Reply 20; *but see* Def. Mot. 14–15 (complaining that Plaintiff Williams did "not allege that the partner who evaluated her was male," asserting that in fact the partner was not, and arguing that this undermines an inference of gender discrimination). Obviously, Plaintiffs have not (nor do they) assert that the mere existence of a male boss, standing alone, suffices to state a disparate impact claim. Such gross mischaracterizations aside, courts are often skeptical of subjective decision-making when the decisionmakers are not members of the protected group being affected. *E.g. Bruhwiler v. Univ. of Tennessee*, 859 F.2d 419, 421 (6th Cir. 1988) ("[T]he legitimacy of the articulated reason for the employment decision is subject to particularly close scrutiny where the evaluation is subjective and the evaluators themselves are not members of the protected minority."); *Phillips v. Cohen*, 400 F.3d 388, 398 (6th Cir. 2005) (approving challenge to employment practices, in part based on the use of a "group of selecting officials" that "overwhelmingly" excluded the protected class). The fact that Jones Day's all-powerful Managing Partner is a man, and its partnership is overwhelmingly male, (in conjunction with Plaintiffs' many other allegations) enhances the plausibility of the alleged gender-based disparate impacts on women associates.

Plaintiffs, permits an inference of disparate impact on women associates—whether through operation of unconscious or intentional discrimination, or both. Pls.' Opp. 20; *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 990 (1988) (emphasizing "the problem of subconscious stereotypes and prejudices" in upholding applicability of disparate impact to "subjective or discretionary employment practices");[19] *see also* TAC ¶ 126 ("[A] female Of Counsel . . . confirmed her experiences with ***sexist leadership*** preventing women from advancing at the Firm." (emphasis added)). Indeed, the Supreme Court and D.C. Circuit both recognize that subjective decision-making by a single person can be challenged under a disparate impact theory. Pls.' Opp. 20–21 (citing *Wal-Mart v. Dukes*, 564 U.S. 338, 350 (2011); *Watson*, 487 U.S. 990–91; *In re Johnson*, 760 F.3d 66, 73 (D.C. Cir. 2014)); *see also Moussouris v. Microsoft Corp.*, No. C15-1483JLR, 2018 WL 3328418, at *17 (W.D. Wash. June 25, 2018) ("If, for instance, a single decision-maker . . . vetted all of the pay and promotion decisions, then the involvement of that one individual . . . could constitute a common practice."). Where Plaintiffs have plausibly alleged both gender-based disparities and a practice of hyper-centralized decision-making, Pls.' Opp. 18–24, they are entitled to proceed with discovery to prove the causal relationship reasonably inferred between the two.

Managing Partner Stephen J. Brogan's role in fostering Firm inequalities, as alleged, TAC

[19] *See also e.g.*, Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 Am. Econ. Rev. 715, 715–16 (2000) (illustrating the heightened susceptibility of subjective-decision-making to unconscious bias); Lauren Stiller Rikleen, *Solving the Law Firm Gender Gap Problem*, Harvard Business Review (Aug. 2013), https://hbr.org/2013/08/solving-the-law-firm-gender-ga. (summarizing results of a study by the Gender Equity Task Force of the American Bar Association, which attributed law firm gender pay disparities in part to "effects of unconscious bias in that process" and recommended, *inter alia*, "a critical mass of diverse" participants in firm compensation decision-making, and training and systems to "override the effects of [unconscious] biases.") .

¶¶ 7; 10; 19–20; 22; 35–36; 42–43; 54–59; 126, underscores the hazard in concentrating unchecked power in the hands of a single individual under a shroud of secrecy.[20] Having boasted for years about the unique benefits accruing from the total power its Managing Partner wields, Jones Day now cannot credibly question Brogan's influence over its plausibly alleged culture of hostility towards women, much less seek an inference that he exercises none. *E.g.* TAC ¶¶ 94–96; 156–57; 172; 246; 249; 280; 282; 309. Plaintiffs' allegations permit the reasonable inference that Brogan condoned this hostility and that his decisions about evaluations, pay, and promotions[21] disparately impact women associates. Pls.' Opp. 20–24.[22]

C. Plaintiffs' TAC Bolsters the Plausibility of Disparate Harms to Women Being Inflicted by Jones Day's Evaluation System

Plaintiffs have added various allegations to further illustrate how Jones Day's subjectivity-driven evaluation system harms women, "including in pay and opportunities for promotion to partnership." TAC ¶ 16; *see also* TAC ¶¶ 14–15; 19–20; 43; 127; 174–75; 181; 227–28; 232. Importantly, consistent with Brogan's "No Whining" policy, "even Jones Day Partners cannot alter

[20] Plaintiffs have never sought to state a claim based on statistical disparities, standing alone. The specific employment practice implicated here is the hyper-centralization of subjective decision-making power in a single actor, Pls.' Opp. 11–18, namely Managing Partner Brogan.

[21] Jones Day incorrectly stated that Plaintiffs abandoned their disparate impact claims with respect to partnership promotions. Def.'s Reply 16. In fact, Plaintiffs have identified the "hyper-centralization of . . . promotion, and related policy decision-making in the hands of [the] Firm Managing Partner" as a specific employment practice. Pls.' Opp. 11–12, 17, 20–24. As Plaintiffs have explained, regardless of whether they were considered for partnership (which ultimately remains a question for discovery), the partnership promotions process disparately impacted them by causing their constructive discharges and contributing to the hostile work environment that they endured.

[22] For the same reasons, Defendant's arguments against DCHRA jurisdiction (Def.'s Suppl. Mem. at 15) are unavailing. Plaintiffs' plausible allegations regarding Managing Partner Brogan's personal involvement, based on their own documented experiences (*see, e.g.*, 41, 44, 136, 166, 296) and Jones Day's abundant and longstanding public representations (*see, e.g.*, 9, 12, 69) (some of which persist even after its frantic post-litigation amendment of its web site (*see, e.g.*, 8, 10)), provide an ample jurisdictional basis for Plaintiffs' class-wide DCHRA claims to proceed at this stage.

[consensus statements]; [and] appeals are uniformly recognized as futile." TAC ¶¶ 14, 232. This fact bolsters the plausibility that Jones Day's evaluation system disparately harms women, who are more likely to suffer from gender-based biases. Pls.' Opp. at 19–20.

Several Plaintiffs also explain further how Jones Day's evaluation system subjects women to gender-based bias. TAC ¶¶ 15 ("[A]lthough the Partner for whom [Plaintiff Tolton] performed the majority of her work gave her a glowing review, Plaintiff Tolton's consensus statement attacked her for needing to take more ownership."); 43; 174 ("Jones Day discriminates against female associates by awarding them lower overall ratings than their male colleagues, even when the individual reviews and ratings they received do not justify low overall ratings. Ms. Williams, for example, routinely received high reviews from individual reviewers, yet her final numeric ratings were far lower."); 175; 181; 227–28; *e.g. Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1221 (10th Cir. 2013) (recognizing discriminatory exercises of discretion in promotions process as subject to challenge for disparate impact on women); *Phillips*, 400 F.3d at 398 (approving challenge to employment practices, including "manipulation of performance reviews . . . and disciplinary action to justify" non-promotion, and "hazy selection criteria permitting subjectivity"). Together with the prior allegations, these facts strengthen the already plausible inference that Jones Day's evaluations system disproportionately harms women. *Cf. Chen-Oster v. Goldman, Sachs & Co.*, 325 F.R.D. 55, 81 (S.D.N.Y. 2018) (certifying class-wide disparate impact claims based on 360 review process, for which plaintiffs demonstrate a statistically significant gender disparity).

In response, Jones Day again attacks Plaintiffs' reliance on "information and belief" pleading. To begin, the Firm characterizes the evaluation system's "disparate negative impact on women" as "a conclusion not a fact." Supp. Mem. 13. This is incorrect. That a disparate impact exists is a factual allegation. The evidentiary support that this allegation will require for Plaintiffs

ultimately to prevail may yet be "peculiarly within the possession and control of" Jones Day, *Hedgeye Risk Mgmt., LLC*, 271 F. Supp. 3d 181 at 189; but the facts, as pled, remain. FACT, Black's Law Dictionary (11th ed. 2019) (defining "fact" as "[s]omething that actually exists; an aspect of reality"). When plaintiffs have "limited access to crucial information," courts rightfully permit them to plead upon "information and belief." *Innova Hosp. San Antonio, Ltd. P'ship v. Blue Cross & Blue Shield of Georgia, Inc.*, 892 F.3d 719, 730–31 (5th Cir. 2018). Absent such leniency, if plaintiffs "cannot state a claim without pleading facts which tend systematically to be in the sole possession of defendants," "remedial scheme[s] of . . . statute[s] will fail," and "crucial rights secured by [them] will suffer." *Id.*; *cf. Hedgeye Risk Mgmt., LLC v. Heldman*, 196 F. Supp. 3d 40, 53 (D.D.C. 2016) (if plaintiff "has a good-faith basis" for an allegation, this "would likely be sufficient to withstand a motion to dismiss"). In any event, Plaintiffs' reasonable belief that there are disparate impacts here is also supported by extensive additional factual matter that "makes the inference[s] of culpability plausible," *Hedgeye*, 271 F. Supp. 3d at 189; *see* Pls.' Opp. 24–25; 32–34;[23] "rais[ing] a reasonable expectation that discovery will reveal evidence of illegal[ity]." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007).

V. Plaintiffs' Equal Pay Act Claims Remain Viable

Jones Day's renewed attack on Plaintiffs' equal pay claims again relies on *summary judgment* cases in an effort to hold Plaintiffs to a higher evidentiary standard than required at this early stage of litigation.[24] *See* Pls.' Opp. at 16. At the pleadings stage, it is "It is sufficient for the

[23] *See also Brown*, 785 F.3d at 917 (anecdotal evidence and surrounding circumstances are probative for certifying class-wide disparate impact claims of discrimination).

[24] As a general matter, courts in this circuit have recognized that a motion for judgment on the pleadings (like the one at bar) and a motion for summary judgment "entail very different legal standards*." McNair v. District of Columbia*, 903 F. Supp. 2d 71, 73 (D.D.C. 2012). *Compare id.* (analysis of the allegations presented in the complaint for the purposes of a motion for partial judgment on the pleadings should be "presumed true and should be liberally construed in the

Commission to plead that [employees of the opposite sex] performed substantially equal work—and yet were paid differently—without getting into the 'equal skill, effort, and responsibility' or 'similar working conditions' aspects of Section 206(d)(1)." *E.E.O.C. v. George Washington Univ.*, No. 17-cv-1978, 2019 WL 2028398, at *5 (D.D.C. May 8, 2019). Plaintiffs need not plead a *prima facie* case of pay discrimination, let alone *prove* their case at the pleadings stage. *See* Def.'s Mot. at 22 (acknowledging that a plaintiff need not establish a prima facie case of pay discrimination to state a claim).

Jones Day further claimed in its original motion that Plaintiffs' EPA claims falter because their First Amended Complaint did not identify specific male comparators. Def.'s Mot. at 24. Defendant's supplemental brief maintains this argument against Plaintiffs Mazingo and Stahl, Def.'s Suppl. Mem. at 10, even as the weight of authority holds that no comparator is necessary at the pleading stage, *see* Pls.' Opp. at 19 (citing cases). Where the TAC does identify certain male comparators by name, *see* TAC ¶¶ 90, 165, 187, 287, or by salary and year, ¶ 187, Jones Day denounces these as insufficient or interprets them as contradicting its cramped interpretation of Plaintiffs' theory of their case. *See* Def.'s Suppl. Mem. at 9. Here again, Jones Day cannot prevail by imposing an inapposite legal standard or a self-serving interpretation of the facts.

As a preliminary matter, Plaintiffs need not plead with specificity individual comparators in order to survive a motion for judgment on the pleadings. Defendant cannot rely upon out-of-circuit summary judgment cases to impose a more demanding standard at this stage. *See* Pls.' Opp.

Plaintiff's favor") *with id.* (when considering a summary judgment motion, "the evidence of the nonmovants is to be believed, and all justifiable inferences are to be drawn in her favor" but the "nonmoving party's opposition … must consist of more than mere unsupported allegations or denials and must be supported by affidavits, declarations, or other competent evidence" (alterations incorporated)).

at 19. In particular, Defendant attempts to argue that Plaintiffs Mazingo's and Stahl's EPA claims are refuted because both "were paid as much as (or more than)" a single male associate comparator invoked by Ms. Draper in the TAC. Def.'s Suppl. Mem. at 10. To support this assertion, Defendant relies exclusively on *Sowell v. Alumina Ceramics*, 251 F.3d 678 (8th Cir. 2001), an Eighth Circuit case affirming a grant of summary judgment. In *Sowell*, the court ruled that a female employee had failed to make out a *prima facie* case under the EPA where the record showed she was paid equally to two male employees but less than two other male employees. *Id*. at 784. This outside-of-circuit summary judgment decision should not be persuasive at this stage.[25]

Jones Day further claims that because Plaintiffs Mazingo and Stahl have not named any "male comparator who earned more than they did," their EPA claims must fail. Def's Suppl. Mem. at 10. But this argument is unavailing for two reasons: First, as Plaintiffs articulated in their initial Opposition, Jones Day promotes a "One Firm Worldwide Culture" in which there are "no artificial boundaries" and associates work on matters outside of their practice groups and particular geographic offices. *See* Pls.' Opp. at 21 n.31. Thus, all named comparators are equally applicable to Plaintiffs Mazingo and Stahl.[26] Second, Plaintiffs Mazingo and Stahl have argued on

[25] Indeed, *Sowell* need not persuade a court at any stage, inasmuch as the rule it applies is contested even within its home circuit. *See Hutchins v. Int'l Bhd. of Teamsters*, 177 F.3d 1076, 1081 (8th Cir. 1999) (pre-*Sowell* case finding that plaintiff could establish a prima facie case of pay discrimination even though the female plaintiff had a starting salary the same as several male comparators and less than other male comparators and where other female employees also had higher starting salaries); *Hennick v. Schwans Sales Enters., Inc*., 168 F. Supp. 2d 938, 949 (N.D. Iowa 2001) (recognizing that *Sowell* did not overrule *Hutchins* and that the *Hutchins* rule "seems more consonant with the Supreme Court's articulation of the burden-shifting paradigm for analysis of discrimination in *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133 (2000)"); *Fagen v. Iowa*, 301 F. Supp. 2d 997, 1004 (S.D. Iowa 2004) (agreeing with *Hennick* that "following the rule articulated in *Sowell* would lead to the perverse result that a female employee could not make out a case of wage discrimination even where she was one of ten females paid half as much as nine males for equal work, so long as a tenth male made the same as or less than the female workers").

[26] See *infra* for related discussion of "establishment" under the EPA.

information and belief that they were paid less than comparable male counterparts. TAC ¶¶ 135–36, 239. "When a plaintiff sets out allegations on information and belief, he is representing that he has a good-faith reason for believing what he is saying, but acknowledging that his allegations are 'based on secondhand information that [he] believes to be true.'" *Barrett v. Forest Labs.*, 39 F. Supp. 3d 407, 431 (S.D.N.Y. 2014) (quoting *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. Walgreen Co.*, 631 F.3d 436, 442 (7th Cir. 2011)); *id.* at 452 (pleading "upon information and belief" sufficient to find Plaintiffs had plausibly stated their EPA claims). The TAC provides Defendant with "fair notice" of Plaintiffs' claims and the "grounds upon which [they] rest." *Boykin v. KeyCorp*, 521 F.3d 202, 214 (2d Cir. 2008).

Defendant's characterization of the EPA claims of Plaintiffs Tolton, Draper, Williams, and Henderson as "conclusory allegations" also misses the mark. Plaintiffs are not required at this stage to provide the salaries of named comparators or to plead detailed, factual information to substantiate claims that they did substantially equal work. Jones Day's arguments to the contrary, *see* Def's Suppl. Mem. at 10, rest on a heightened "plausibility" standard, not the prevailing law.

Defendant's continued reliance on inapposite summary judgment cases[27] is particularly poignant alongside its efforts to deploy personnel information to which Jones Day alone has access to refute Plaintiffs' allegations *at the pleading stage*. This it cannot do; indeed, the cases to which Jones Day cites in support of its position demonstrate why that position is untenable. *See, e.g.*, *Younts v. Fremont County*, 370 F.3d 748, 752–753 (8th Cir. 2004) ("Whether employees perform

[27] For instance, Jones Day cites to *Renstrom v. Nash Finch Co.*, 787 F. Supp. 2d 961, 970 (D. Minn. 2011), for the proposition that skill effort and responsibility are "separate tests, each of which must be met in order for the equal pay standard to apply," but fails to mention that the court was analyzing whether the plaintiff had established a *prima facie* case of wage discrimination. As noted above, Def.'s Supp. Mem. at 11, 12, the law does not require Plaintiffs to establish a *prima facie* case at this stage.

substantially equal work 'requires a practical judgment on the basis of all the facts and circumstances of a particular case, including factors such as level of experience, training, education, ability, effort, and responsibility." (internal quotation marks omitted)); *Spencer v. Va. State Univ.*, 919 F.3d 199, 203 (4th Cir. 2019) (noting summary judgment was granted after discovery); *EEOC v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 258 (2d Cir. 2014) (determining that, after three years of discovery during which the E.E.O.C. had "ready access" to Defendant's documents and employees, the E.E.O.C. failed to allege a prima facie case of an EPA violation).

Defendant's attempts to rely on its Answer to Plaintiff's TAC are similarly improper. "It is axiomatic . . . that for purposes of the court's consideration of the Rule 12(c) motion, all of the well pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false. Thus, in effect, the party opposing the motion has the benefit of all possible favorable assumptions." Wright & Miller, *Fed. Prac. & Proc. Civ.* § 1368 (3d ed.) (footnote omitted). *See also All. of Artists and Recording Cos., Inc. v. Gen. Motors Co.*, 162 F. Supp. 3d 8, 16 (D.D.C. 2016) (noting that a Rule 12(c) motion "is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking at the substance of the pleadings and any judicially noted facts") (quoting *Hebert Abstract Co. v. Touchstone Props., Ltd.*, 914 F.2d 74, 76 (5th Cir. 1990)); *N. Am. Catholic Educ. Programming Found., Inc. v. Womble, Carlyle, Sandridge & Rice, PLLC*, 887 F. Supp. 2d 78, 82 (D.D.C. 2012).

A. Plaintiff Tolton Pleads Plausible EPA Claims

In response to Plaintiff Tolton's identification of Justin Smith as a comparator, *see* TAC ¶¶ 89–90, Jones Day contends that her EPA claim must fail because she does not explain how Mr. Smith performed similar or "virtually identical" work. Def.'s Suppl. Mem. at 10–11. This ignores

that a plaintiff need not make out a *prima facie* case at the pleadings stage. Jones Day cites to *Renstrom v. Nash Finch Co.*, but fails to mention that the plaintiff's claim in that case foundered *at the summary judgment stage* because she did not produce evidence that her job and those of her comparators involved equal effort: "Without evidence of Renstrom's typical work schedule, it is not possible to compare the burden imposed on Renstrom by her additional duties with the burdens imposed on [her comparators] by their additional duties." *Renstrom*, 787 F. Supp. 2d at 970. This is exactly the type of comparative evidence that Plaintiffs seek in discovery, further underscoring why the Court should not dismiss their EPA claims at the pleading stage.

B. Plaintiff Draper Pleads Plausible EPA Claims

Jones Day's argument that Ms. Draper's EPA claim must fail because she alleges on information and belief that she was paid less than four unnamed male comparators within her office is unavailing for the same reasons. Like Plaintiffs Mazingo and Stahl, Ms. Draper need not name specific male comparators. In *Fairchild v. Quinnipiac University*, 16 F. Supp. 3d 89 (D. Conn. 2014), the court found that a female head coach's allegation that her wages and benefits "were less than those paid to similarly-situated male employees," sufficed to plead a claim under a state EPA that relies on the same standard as the federal EPA, because "[i]n these circumstances . . . [Defendant] is well aware of the potential universe of similarly-situated [comparators] whose salaries might be higher than [plaintiff's]," *id.* at 96. Similarly, Plaintiffs are female associates who allege that they were paid less than their similarly situated male associate colleagues. The universe of associates at Jones Day is a closed one. Jones Day's publicly stated policy of pay secrecy ensures that Jones Day (and only Jones Day) is "well aware" of the universe of Plaintiffs' appropriate

comparators.[28] *See also Jbari v. District of Columbia*, 304 F. Supp. 3d 201, 208–09 (D.D.C. 2018) (permitting discrimination claims to proceed on information and belief).

C. Plaintiff Williams Pleads Plausible EPA Claims

Jones Day attacks Plaintiff Williams's EPA claim on the grounds that she did not state that her comparators worked alongside her in the same office.[29] Def.'s Suppl. Mem. at 12. Relying on *Renstrom v. Nash Finch Co.*, Jones Day contends that the EPA's reference to "within any establishment," *see* 29 U.S.C. § 206(d)(1), limits comparators to the same geographic location as the plaintiff. Def.'s Suppl. Mem. at 12. Defendant's argument here is disingenuous in the extreme, however, given the Firm's promotion of a culture of "One Firm Worldwide," instilling the idea of "no artificial boundaries" into associates by staffing them on matters in any Jones Day office rather than limiting them by their physical location. Courts have long recognized that a strong, centralized corporate structure can warrant a determination that "establishment" need not be constrained to a particular location for the purposes of the Equal Pay Act. *See Grumbine v. United States*, 586 F.

[28] Jones Day claims that because Plaintiffs allege in the operative Complaint that one male, fourth-year associate in Atlanta made $220,000 in an unspecified year, Plaintiffs have refuted their own theory of the case. In fact, however, Plaintiffs do not simply allege that all male associates were making Cravath pay and female associates were not. Rather, Plaintiffs allege that the inconsistency between what Jones Day represented about its compensation practices—that it paid high-performing associates at or above market—and what Plaintiffs experienced is one piece of evidence that led Plaintiffs to believe that Jones Day's "black box" masks a pattern and practice of discrimination based on gender. *See* TAC ¶ 42–43 (identifying Jones Day's public statements that it pays high-performing associates market or above market, and explaining Plaintiffs' theory that centralized decision-making and the subjective nature of the review process provide cover for underpaying women). That one of the male comparators identified by Plaintiffs made less than Cravath (and possibly less than one or more of the named Plaintiffs in a given year) does not refute Plaintiffs' theory. *See, e.g.*, *Hutchins*, 177 F.3d at 1081.

[29] Jones Day emphasizes that one of the news articles Plaintiffs cite in the Third Amended Complaint notes that geography is not an issue for Cravath since it has only one office, in New York City. *See* Def.'s Suppl. Mem. at 12 (referencing TAC ¶ 46 n.14). This ignores Plaintiffs' repeated explanations that "Cravath pay" and "market pay" are used colloquially to refer to an industry-recognized pay scale. *See* Pls.' Opp. at 18 n.28.

Supp. 1144, 1148 (D.D.C. 1984) (explaining legislative history of the geographic meaning of "establishment" had "little relevance to the Equal Pay Act provisions of the Fair Labor Standards Act, and even less so in the area of governmental employment, where typically central supervision exists and pay standards apply for an entire system irrespective of where the employee happens to be located"); *see also Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 591–92 (11th Cir. 1994) (geographic limitation to "establishment" for EPA claim inappropriate where centralized control of operations and "functional interrelationship" between Plaintiffs and comparators could lead a reasonable trier of fact to infer a single establishment existed).

Jones Day also argues that Plaintiff Williams's EPA claim is deficient for lack of factual allegations about the practice groups, quality of work, hours billed, or the pay of her comparators. Def.'s Suppl. Mem. at 11 n.6, 12 n.7. Here again, Defendant seeks to impose a more demanding pleading standard than the law requires. Jones Day's additional argument that Williams "does not allege any facts from which the court could conclude that she would be competent to know how many hours any of the men had logged," *Id.* at 11 n.6, again underscores the fact that Jones Day is the party with exclusive access to this and other personnel information.

D. Plaintiff Henderson Pleads Plausible EPA Claims

Jones Day also contends that Plaintiff Henderson does not plead facts sufficient to show that the six comparators she names did substantially equal work. Def.'s Suppl. Mem. at 12. This claim fails for the reasons stated above: at this stage, no more fulsome recitation of the facts is required. The Firm also attempts to twist Ms. Henderson's assertion that Bret Stancil, a white, male associate within her same class, was given more opportunities at the same time she was deprived of them, *see* TAC ¶¶ 280, 285, to argue that she did not perform "equal work." Def.'s

Suppl. Mem. at 12.[30] Jones Day's attempt to invoke its own discriminatory practices to undermine Ms. Henderson's claims may run afoul of this jurisdiction's "chutzpah doctrine." *See DL v. D.C.*, 302 F.R.D. 1, 15–16 (D.D.C. 2013), *aff'd*, 860 F.3d 713 (D.C. Cir. 2017). Moreover, EPA claims may also include allegations that comparators were given additional benefits that the plaintiff did not receive. *See Younts*, 370 F.3d at 753–54 (remanding to district court for a ruling on whether benefits such as a uniform allowance and use of cellular phone and the county vehicle constitutes additional benefits).

Jones Day relies on *E.E.O.C. v. Port Authority of N.Y. and N. J.* to argue that Plaintiffs' allegations rise and fall on "the premise that all Jones Day associates perform the same work." Def.'s Suppl. Mem. at 13. Here again, Jones Day fails to account for the fact that the district court in that case found that the E.E.O.C., *after three years of access to defendant's files*, relied solely on "'broad generalities about attorneys in general'—rather than 'say[ing] anything about [the] Port Authority's attorneys in particular,' described the work of 'virtually any practicing lawyer' and thus did not amount to 'a true comparison of the content of the jobs at issue.'" *Port Auth.*, 768 F.3d at 252 (quoting *Port Auth. of N.Y. and N.J.*, No. 10 Civ. 7462 (NRB), 2012 WL 1758128, at *4

[30] Defendant also claims that Ms. Henderson's EPA claim is time-barred and cites generally to 29 U.S.C. § 255. Under that portion of the Fair Labor Standards Act, applicable to the EPA, a three-year statute of limitations period applies for discrimination claims based on willful violations. However, Defendant's argument is not persuasive. Under the EPA, "a claim charging denial of equal pay accrues anew with each paycheck." *Ledbetter v. Goodyear Tire & Rubber Co., Inc*., 550 U.S. 618, 658 n. 8 (Ginsburg, J. dissenting*), superseded statute on other grounds*, U.S. Pub. L. N. 111-2 (Jan. 29, 2009). Ms. Henderson was employed by Jones Day through mid-July 2016 and she alleges that Jones Day's policies intentionally pay women less than men. Since Ms. Henderson joined this lawsuit in June 2019, Ms. Henderson's EPA claim is not time-barred. *Cf. Goodman v. Port Auth. of N.Y. & N.J.*, 850 F. Supp. 2d 363 381 (S.D.N.Y. 2012) ("Whether or not a violation of the FLSA is 'willful' is fact-intensive inquiry not appropriately resolved on a motion to dismiss.").

(May 17, 2012)).[31] Unlike the E.E.O.C. in *Port Authority*, Plaintiffs have not had three years of access to Defendant's records to substantiate or refute their claims. *Port Authority*, like so many of the cases Defendant cites, stands for the principle that Plaintiffs in a well-pleaded case should have the opportunity to prove their case after discovery.

Finally, despite Jones Day's argument to the contrary, Plaintiffs and their counsel did not—and do not, absent discovery—have "ample" avenues for inquiring into the compensation of comparators. *See* Def.'s Suppl. Mem. at 13.[32] Where Jones Day's pay secrecy policy *by design* keeps Plaintiffs (and their colleagues) from knowing the compensation of other associates, it cannot turn around and deny Plaintiffs access to information because they have been unable to wring it voluntarily from their former colleagues and comparators. *Id*. at 13.

Contrary to Jones Day's bluster about a "fishing expedition," pleading upon "information and belief" is sufficient at this stage, especially in cases where access to relevant information is within the sole possession of one party. *Artista Records LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) ("The *Twombly* plausibility standard . . . does not prevent a plaintiff from pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant . . . ") (internal quotation marks and citations omitted); *Jbari*, 304 F. Supp. 3 at 209 (relying *inter alia* on *Artista Records*). Even the cases to which Jones Day cites to support its position do the opposite. For instance, Jones Day cites to *Hedgeye Risk Management,*

[31] The court also criticized the E.E.O.C.'s methodology, affirming the district court's finding that it was "random" to simply compare claimants and comparators "whose 'combined' bar admission and service dates are separated by no 'more than ten years.'" *Port Auth.*, 768 F.3d at 257. Plaintiffs here have neither engaged or proposed a comparison divorced from detailed comparisons of education, training, and actual job duties; however, Plaintiffs are prevented from providing such detailed comparison without discovery.

[32] This argument is repeated from Defendant's original motion (Def. Mot. at 35) to which Plaintiffs responded. Pls.' Opp. at 24–25.

LLC v. Heldman, 2019 WL 4750243, at *13 (D.D.C. Sept. 29, 2019) for the proposition that "fishing expeditions" are not permitted under Rule 11. While that is true, here again Jones Day relies upon a summary judgment decision; a prior decision in the same case granted leave for discovery to proceed. *See id.* at *1.[33] Here, too, Plaintiffs are entitled to discovery.

VI. Plaintiffs Tolton and Draper Have Plausibly Pleaded Their Retaliation Claims

As already noted (Pls.' Opp. at 28), Plaintiffs are not required to plead, much less prove a *prima facie* case of retaliation at the pleadings stage. *Menoken v. McGettigan*, 273 F. Supp. 3d 188, 200 (D.D.C. 2017) ("[A] plaintiff alleging a retaliation claim faces a low hurdle at the motion to dismiss stage, and does not need to plead each element of her prima facie case." (internal quotation marks and citations omitted)). Plaintiffs' TAC meets the burden to warrant discovery on these claims. *See* Pls.' Opp. at 28–29.

A. Plaintiff Tolton has sufficiently alleged a claim of retaliation

Ms. Tolton's employment with Jones Day was brought to a premature and abrupt conclusion when the Firm locked her out of her email and banned her from the office prior to her last day. These actions would plausibly "dissuade[] a reasonable worker from making or

[33] Jones Day's exclusive hold on the information necessary for Plaintiffs to evaluate their claims distinguishes this case from those cited in Defendant's Supplemental Motion. *See, e.g., BEG Invs., LLC v. Alberti*, 85 F. Supp. 3d 13, 52–53 (D.D.C. 2015) (finding Rule 11 violation because of the "baseless" allegation included in a pleading that another attorney had fabricated a report, an allegation the sanctioned attorney even later described as "bizarre"); *Verfuerth v. Orion Energy Sys., Inc.*, 65 F. Supp. 3d 640, 647 (E.D. Wisc. 2014) (finding pleading "on information and belief" not sufficient where information was not within the "peculiar" knowledge of the defendant since plaintiff would know if his reputation was harmed by the letter he alleged was defamatory). Furthermore, Plaintiffs' Third Amended Complaint includes detailed allegations about Jones Day's public statements about its compensation practices and the experience of Plaintiffs with the subjective evaluation system, with a sexist culture often encouraged by their supervisors, and the "black box" compensation that is centrally administered and, per Firm policy, confidential. This is a far cry from speculation-turned-pleading as to factual details that took place in full public view. *Cf. Henry v. Black*, No. 2:11–CV–129 TS, 2011 WL 2938450 (D. Utah July 19, 2011).

supporting a charge of discrimination." *Burlington N. & Santa Fe. Ry. Co. v. White*, 548 U.S. 53, 57 (2006). Further, Defendant does not dispute that Plaintiff Tolton engaged in protected activity when she told several Jones Day partners that she believed that the Firm was motivated by her pregnancies and leave-taking when it imposed negative reviews and salary freezes on her during her maternity leaves. *See* Def.'s Suppl. Mem. at 14; TAC ¶¶ 127–28; Pls.' Opp. at 29. Jones Day's insistence that its conduct toward Ms. Tolton never rose to the level of "adverse action" ignores what courts in this district have already acknowledged: "'[T]he significance of any given action of retaliation,' and therefore its potential to deter discrimination complaints, 'will often depend on the particular circumstances,'" and therefore, "an action may be materially adverse even if no tangible harm results." *Doe 1 v. George Washington Univ.*, 369 F. Supp. 3d 49, 73 (D.D.C. 2019) (quoting *Burlington N.*, 548 U.S. at 69); Pls.' Opp. at 31.

Plaintiff Tolton's own account of her abrupt termination by Jones Day, which must be taken as true at this stage, makes the significance of Defendant's retaliatory action and thus its deterrence potential abundantly clear. Ms. Tolton pleads, *inter alia*, that she was told by Partners Richard Grabowski and Darren Cottriel that she "'should look for other opportunities outside the Firm,'" and "prioritize finding another job instead of taking on any billable work at the Firm." TAC ¶ 122. Contrary to Jones Day's assertion, this is no admission of idleness on Ms. Tolton's part (*see* Def.'s Suppl. Mem. at 14); indeed, she pleads that she followed Partner Cottriel's *express instruction* when she declined to take on billable work offered to her by Partner John Vogt during the last six months of her employment with Jones Day. *See* TAC ¶ 124. Only after Ms. Tolton spoke candidly to several female attorneys whom she mentored in response to their questions about her departure (TAC ¶ 126) did Jones Day change its tune, shifting from offers of assistance with finding new employment (TAC ¶ 125) to abrupt banishment. Defendant's strained reading of ¶

126 to indicate that Ms. Tolton's abrupt termination was harmless privileges its own account of the facts over Plaintiff Tolton's. This the Defendant may not do so at the pleading stage, where even formal references to its own factual recitation are unavailing. *See* Wright & Miller, *Fed. Prac. & Proc. Civ.* § 1368 (3d ed).

B. Plaintiff Draper has sufficiently alleged a claim of retaliation.

Plaintiff Draper engaged in protected activity because the Firm *understood her complaints to be about its treatment of her after she took maternity leave*. *See* Pls.' Opp. at 32. The circumstances surrounding Ms. Draper's meeting with Partner Parker—and her questions at the women's event thereafter—underscore this connection. Plaintiff Draper requested that meeting to inquire, *inter alia*, why leadership had not foreseen Ms. Draper being frozen out of trial opportunities, something the Firm now seemed to characterize as an inevitable result of her seniority. TAC ¶ 219.

Jones Day first attempts to rewrite Ms. Draper's allegations to mask the cumulative effect of the gender discrimination she has alleged. Her meeting with Partner Parker happened *against the backdrop* of Ms. Draper seeing male associates within the Tobacco Litigation Group being treated differently from her and from other female associates. *See* TAC ¶ 209 (describing how her concerns about the frequency of travel, and those of another female associate with children, were dismissed, whereas the same concerns expressed by a male associate with children were taken seriously); TAC ¶ 210 (explaining that Ms. Draper had heard from colleagues that Partner Parker was known for showing preferential treatment to men). Ms. Draper also describes hiding her second pregnancy and miscarriage from the Firm, expressing that she was fearful enough about the reaction from Partner Parker and others that she did not take time off to recover. TAC ¶ 213. Her experience of the in-Firm women's event, including her fateful question, was in turn shaped

by her conversation with Partner Parker just a week before. *See* TAC ¶ 220.

Defendant cites to *Pope v. ESA Servs., Inc.*, 406 F.3d 1001 (8th Cir. 2005) (another summary judgment case) and *McFarland v. George Washington Univ.*, 935 A.2d 337 (D.C. 2007), but these cases are distinguishable. In *Pope*, an African American employee made a comment that having African American district managers would serve as an incentive for him to apply, intending to introduce his interest in a district-manager-in-training position. *Pope*, 406 F.3d at 1010. The court found that this did not amount to protected activity because he "did not attribute the absence of black district managers in his region to racial discrimination." *Id*. Ms. Draper, by contrast, pleads that she raised specific questions about negative treatment of women at the Firm, *based on their gender*, and did so *just one week* after experiencing the discriminatory conduct she described.

In *McFarland*, a case brought pursuant to the DCHRA, the D.C. Court of Appeals determined that the lower court had not erred when it granted judgment as a matter of law following trial. *McFarland*, 935 A.2d at 343. The appeals court noted that plaintiff, in a letter to his employer, had asked questions about why he had not been interviewed for a position, but had failed to raise any questions about discriminatory conduct. *Id.* at 359–60. The court recognized that "engaging in protected activity under the DCHRA does not require recitation of 'magic words,'" but felt plaintiff's communication had fallen short of the threshold for protected activity, particularly because he had "previously filed a discrimination and retaliation complaint against [the employer and] certainly knew how to do so." *Id.* at 360. Ms. Draper's claims are distinguishable, not only because they are made at the pleadings stage, but also because her question during the women's event touched specifically on the treatment of women at the Firm.

Moreover, "temporal proximity is not the only way to allege causation." *Menoken*, 273 F.

Supp. 3d at 202.[34] Plaintiff Draper alleges that she complained about her treatment post-maternity and that she flagged during an in-Firm event hosted by partners an issue about the treatment of women at the Firm. Those who were in supervisory roles knew about Ms. Draper's complaints, and the Firm swiftly retaliated against her. TAC ¶ 221. She also learned around the time of her departure that she was not alone; rather, other female associates had been demoted, taken off partner track, and pushed out or terminated after having children. TAC ¶ 234. In short, Ms. Draper pleads viable retaliation claims against Jones Day that should proceed to discovery.

VII. Plaintiffs Have Standing to Seek Injunctive Relief Against Jones Day

Plaintiffs' Opposition to Defendant's original Rule 12(c) motion refuted many of Defendant's legal arguments on this point. *See* Def.'s Mot. at 36; Pls.' Opp. at 42.[35] Plaintiffs' Third Amended Complaint also "cured" any alleged deficiency as to form with respect to Plaintiffs' demand for reinstatement, alongside other comprehensive injunctive relief. *See* Pls.' Opp. at 41 n. 46. Defendant now asserts that Plaintiffs' broader claim for injunctive relief is "disingenuous," complaining that "no Plaintiff has pled facts suggesting that she personally desires reinstatement and would return to Jones Day if it were an option . . . ." Def.'s Suppl. Mem. at 15. But Plaintiffs' demand for reinstatement must be understood in the context of the broader injunctive relief they demand, wherein the systemic discrimination of which they complain has been remediated. So too, Jones Day's demand for a more fulsome factual recitation ignores their

[34] The Supreme Court precedent cited by Defendant in its initial brief also implicitly acknowledges that temporal proximity is but one way of demonstrating causal connection. *See Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (per curiam) ("The cases *that accept mere* temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close.'") (internal citation omitted) (emphasis added).

[35] Plaintiffs pointed out, for instance, that *Chen-Oster v. Goldman, Sachs & Co.*, 877 F. Supp. 2d 113 (S.D.N.Y 2012), was reconsidered and reversed on the issue of injunctive relief. *See Chen-Oster v. Goldman, Sachs & Co.*, 251 Supp. 3d 579, 588–89 (S.D.N.Y. 2017) (*Chen-Oster II*).

own burden here: "To prove [request for reinstatement] is moot, Defendants must satisfy a heavy burden, which they have not, to show that it would be impossible to grant [plaintiff] reinstatement*." Chen-Oster v. Goldman, Sach & Co*., 251 F. Supp. 3d 579, 592 (S.D.N.Y. 2017) (internal quotation marks omitted).

The sole case to which Defendant turns for support here has little to offer. Jones Day cites to *Bayer v. Neiman Marcus Grp., Inc.*, 861 F. 3d 853 (9th Cir. 2017) for the proposition that only a current employee or "perhaps an ex-employee whom a court concludes is 'reasonably certain' to be reinstated" is eligible to seek injunctive relief. Def.'s Supp. Mot. at 16 (quoting *Bayer*). This does not undermine Plaintiffs' claims for injunctive relief at this stage; instead, like so many of the cases Jones Day cites, *Bayer* stands for the proposition that such claims should be allowed to proceed to discovery. Only at the summary judgment stage did the court in *Bayer* conclude that plaintiff's claim to reinstatement ought not proceed, since he had "produced no evidence to suggest that he plans to seek employment with [defendant] again . . . ." *Bayer*, 861 F.3d at 865. Plaintiffs here should be afforded the same opportunity to provide such evidence as this litigation proceeds.[36]

CONCLUSION

Jones Day cannot rewrite the pleading standard or Plaintiffs' pleadings to evade discovery into Plaintiffs' well-pleaded claims of its longstanding pattern and practice of discrimination and retaliation. Defendant's efforts to avoid court scrutiny into its "black box" policies and practices should end now with this Court's denial of its motion.

[36] Jones Day's efforts to rewrite Plaintiffs' pleadings here again are unavailing. The self-serving statement that "half of the Plaintiffs (Mazingo, Williams, and Stahl) actually left the Firm of their own volition (see TAC ¶¶ 156, 183, 269)" cannot reasonably suffice to deny plaintiffs their day in court on constructive discharge claims. *See* TAC ¶¶ 3, 562–567; *Green v. Brennan*, 136 S. Ct. 1769, 1777 (2016) (constructive discharge by definition "treats that resignation as tantamount to an actual discharge."). To credit Jones Day's interpretation of the facts here would cause a "manifest injustice." *Cf. Chen-Oster II*, 251 Supp. 3d at 589.

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Respectfully submitted,

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